

RICO T. MITCHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS	)	DATE ISSUED: 07/05/2013
INCORPORATED - PASCAGOULA	)	
OPERATIONS	)	
f/k/a Northrop Grumman Ship Systems, Inc.	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand and the Decision and Order Denying Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rico T. Mitchell, Pascagoula, Mississippi, *pro se*.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Second Remand and the Decision and Order Denying Claimant's Motion for Reconsideration (2008-LHC-2091) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). In an appeal by a claimant who is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the third time. On June 19, 2007, claimant sustained an injury to his back while working for employer. Claimant was diagnosed with a back strain and released to light-duty work. Thereafter, claimant attempted to return to work on two occasions, but was unable to do so due to his continuing symptoms. Employer voluntarily paid claimant temporary total disability compensation on June 20, 2007, and from June 26 through August 13, 2007. Employer terminated claimant's employment in October 2008.

In his initial Decision and Order, the administrative law judge found that claimant's back condition reached maximum medical improvement on October 17, 2007, that claimant was unable to return to his pre-injury employment with employer, and that employer established the availability of suitable alternate employment when claimant received an offer of employment from a local Wendy's restaurant. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from June 20 through October 16, 2007, permanent total disability benefits from October 17, 2007 through October 1, 2008, and permanent partial disability benefits, based upon two-thirds of the difference between claimant's average weekly wage of \$586.53 and the wages paid by the proffered Wendy's position, from October 2, 2008, and continuing. 33 U.S.C. §908(a), (b), (c)(21), (h).

On appeal, the Board affirmed the administrative law judge's finding that claimant is capable of employment with restrictions but vacated his finding that the janitorial position offered to claimant by a local Wendy's restaurant established the availability of suitable alternate employment. The Board remanded the case for the administrative law judge to address employer's January 14, 2009 and August 7, 2009 labor market surveys. *Mitchell v. Northrop Grumman Ship Systems, Inc.*, BRB No. 10-0244 (July 23, 2010) (unpub.).

On remand, the administrative law judge compared claimant's restrictions with the jobs identified in the January 14, 2009, labor market survey and found the positions at Lowes, Cracker Barrel, and Sprint were within claimant's restrictions. Consequently, the administrative law judge found that employer established the availability of suitable alternate employment as of January 14, 2009. Finding that claimant "conceded he made no attempt to acquire these positions," the administrative law judge awarded claimant permanent total disability benefits from October 17, 2007 to January 14, 2009, and permanent partial disability benefits from January 14, 2009, onward.

Claimant appealed the administrative law judge's decision. The Board affirmed the administrative law judge's finding that employer established the availability of suitable alternate employment; however the Board vacated his finding that claimant conceded he had not pursued alternate employment as it was not supported by substantial evidence. Consequently, the Board remanded the case for the administrative law judge to address claimant's diligence in seeking alternate work. Stating it was unclear whether

claimant had raised a Section 49, 33 U.S.C. §948a, discrimination claim before the administrative law judge, the Board directed the administrative law judge to address whether claimant had raised the issue before him, and, if so, to address it.

On second remand, the administrative law judge found that claimant did not diligently pursue alternate employment and had not raised a Section 49 claim. Accordingly, the administrative law judge reinstated the award of permanent partial disability benefits from January 14, 2009, onward. The administrative law judge denied claimant's motion for reconsideration. Claimant appeals the administrative law judge's Decision and Order on Second Remand. Employer has not responded.

Where, as in the instant case, a claimant establishes a prima facie case of total disability and the employer establishes the availability of suitable alternate employment, the claimant can prevail in his quest to establish total disability if he demonstrates he diligently tried but was unable to secure employment of the type shown by employer to be suitable and available. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5<sup>th</sup> Cir.), *cert. denied*, 479 U.S. 826 (1986); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). The administrative law judge found that claimant applied to only two jobs in 2009. The administrative law judge referenced claimant's September 1, 2009, hearing testimony, in which claimant stated he had applied for positions in 2009 only with Target and Cracker Barrel, he could not recall when he went to Sprint or Lowes, and he did not apply to the Subway, KFC, or Beau Rivage positions identified in employer's August 7, 2009, labor market survey.<sup>1</sup> Decision and Order at 2; Tr. at 60-73. The administrative law judge's finding that claimant's job search was not diligent is rational and supported by substantial evidence. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Consequently, we affirm the administrative law judge's award of permanent partial disability benefits from January 14, 2009, onward.

Section 49 prohibits an employer from discharging or discriminating against an employee because he has claimed or attempted to claim compensation under the Act. 33 U.S.C. §948a; *see, e.g., Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5<sup>th</sup> Cir. 1998). In his previous appeal to the Board, claimant argued he had been wrongfully terminated in 2008 after filing his claim. As it was unclear whether claimant had alleged a Section 49 violation, the Board remanded the case for the

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<sup>1</sup>Although claimant stated in his January 20, 2009, deposition that he had applied for jobs at Walmart, Walgreens, Jerry Lee's Grocery Store, Burger King, Wendy's, CVS, Office Depot, and Target, he also contradicted himself by stating that he did not apply for any of those jobs in 2009. EX 19 at 58-61.

administrative law judge to determine whether the issue had been raised and, if so, to address it.

In his Decision and Order on Second Remand, the administrative law judge found that claimant had not made a Section 49 claim before him. The administrative law judge stated the issue had not been raised in pre-hearing filings. Moreover, in responding to the administrative law judge's question, claimant specifically stated at the hearing that the only issues before the administrative law judge were the nature and extent of claimant's disability and his entitlement to medical expenses. Tr. at 10. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not raise a Section 49 discrimination claim in this case. *See Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982).

Accordingly, the administrative law judge's Decision and Order on Second Remand and the Decision and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge